5-18-1976

Burjett Harrod, Individually, etc. v. City of Shelbyville, Kentucky

Appellant's Brief 1976-SC-0378

APPELLANT'S BRIEF

3785

SUPREME COURT OF KENTUCKY

File No. 76-378

BURJETT HARROD, Individually, Etc. - **Appellant**

versus

CITY OF SHELBYVILLE, KENTUCKY - **Appellee**

Appeal from Shelby Circuit Court

BRIEF FOR APPELLANT, BURJETT HARROD, INDIVIDUALLY, ETC.

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This is to certify that copies of the within brief have been served on Hon. C. Lewis Mathis, Jr., and the Hon. Samuel Neace, the trial judge, pursuant to RAP 1.250, this the 14 day of May, 1976.

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May it please the Court:

STATEMENT OF THE CASE

(a) Statement of the Nature of the Proceeding

This action was commenced in the Shelby Circuit Court on Petition of the Fourth Class City of Shelbyville for the annexation of approximately 154 acres of land located adjacent to the westernmost boundary of the city and lying south of the north edge of U. S. Highway 60. Pursuant to K.R.S. 81.220, 75 of the 92 resident voters of the territory to be annexed filed a defense setting forth reasons why the territory should not be annexed.

The Court, on its own motion, vacated the bench and a Special Judge, Honorable Samuel Neace, was appointed to try the case. Depositions were taken, substantial facts were stipulated and the case was tried to the Court without the intervention of a jury. The Court made its Findings of Fact and Conclusions of Law and entered its Order that the territory be annexed to the City of Shelbyville. From this Order, the remonstrants prosecute this appeal.

(b) Essential Facts Necessary to Determine Issues

Since no question was raised as to the publishing of the Ordinances, proper description of the property and other such procedural requirements, no recitation will be made of those facts.

Shelbyville, Kentucky is a fourth class city, KRS 81.010[4], is the county seat of Shelby County and is the only city lying wholly within the county except for the town of Simpsonville, a sixth class city (KRS 81.010[6]. Shelbyville lies in almost the exact center of the county along either side of Kentucky U. S. Highway 60 and two to three miles north of Interstate Highway 64.

The area sought to be annexed lies along and contiguous to a portion of the western boundary of the city extending westward to the Old Finchville Road (formerly Kentucky Highway 55) and south from the north line of U. S. Highway 60.

It was stipulated that the area contains 23 businesses (one closed) (Record, p. 41), 87 residences, 75

of which are owner occupied (Record, p. 40), and 100 acres of raw land, 45 acres of which are owned by the School Board and are therefore tax exempt (Record, p. 39).

It was also stipulated that 75 resident voters of the area executed affidavits objecting to annexation while 17 resident voters did not sign an affidavit. There was no stipulation, nor any evidence, that any resident voter favored annexation.

Three ordinances of the City of Shelbyville were filed in the record and made a part of the evidence. In the sequence of their pagination in the record, these are:

(1) An ordinance setting out the policy and procedure relating to Extension of Water and Sanitary Sewer Service by the Shelbyville Municipal Water and Sewer Commission, Shelbyville, Kentucky.

It is at pp. 44-55 of the record and is sometimes referred to in the testimony and briefs as the "Policy Ordinance".

(2) Ordinance establishing a Municipal Water and Sewer Commission.

It is found at pp. 56-59 and is referred to variously as the "establishing" or "acquisition" Ordinance.

(3) Ordinance providing for the issuance of Revenue Bonds for the acquisition of the water system and combining of the sewer system and for extensions and improvements.

It is found at pp. 60-72 of the record and is sometimes referred to as the Ordinance providing for the issuance of the Bonds.

Various other documents and tabulations were stipulated at the outset of the trial. They are listed at transcript volume I, p. 1 and appear at pp. 34-72 of the record. These will be alluded to as needed in argument.

The trial required the better part of two days and witnesses included:

For the City:

Marshall Long, Mayor of Shelbyville

James Yocum, manager of the Firestone Store located in Village Plaza Shopping Center in the annexed area.

Charles T. Long, Chairman of the Shelbyville Municipal Sewer and Water Commission.

For the Remonstrants:

Mrs. Frances E. Simpson, one of the initial remonstrants.

Cassius Dewey Luttrell, also one of the original remonstrants.

Tom Hower, a city resident who owns substantial interest in corporations owning the nursing home and Village Plaza Shopping Center which, together, house 17 of the 23 businesses in the annexed area.

Jim Rogers, Shelby County Road Engineer.

During the course of the trial, Mr. Charles Long was asked (Tr., p. 116):

> "Q. 207. Now, has the Sewer and Water Commission affirmatively adopted a plan for sewering Grandview Subdivision?"

He answered:

> "A. No, we have not, and will not do so until the area is annexed into the City of Shelbyville."

After the trial, and as a part of the argument in his memorandum to the Court (Record, p. 169), the City Attorney quoted from, and furnished to the Court, a letter (Record, p. 171) from that same Charles Long setting forth a resolution adopted by the Commission on October 14, 1975, twelve days after the trial. The letter is dated November 4, 1975, but was referred to in Mr. Mathis' brief filed October 21, 1975. It attempts to counteract, after submission, the direct testimony given at the trial.

The Court issued its Findings of Fact, Conclusions of Law and Judgment which were filed of record on November 17, 1975.

Other facts necessary to the limited arguments here presented are so sketchy and fragmented that they would not form a useful picture if set out here. They will be pointed out in the arguments.

ARGUMENT

I

What Issue or Issues Are to Be Determined By the Trial Court in Annexation Proceedings Instituted By a Fourth Class City?

Shelbyville, Kentucky, is a Fourth Class City [KRS 81.010(4)] and, as such, is regulated by KRS 81.210 and KRS 81.220 in annexation matters.

KRS 81.210 sets out the procedures to be followed by a fourth class city in annexing territory. KRS 81.220 creates a right in the resident voters of the territory to file a defense against any action for annexation.

The statute also clearly indicates a legislative intent that whether annexation is decreed or denied should depend, to some extent, upon whether or not a majority of the resident voters in the area sought to be annexed remonstrate against it.

The statute provides, in part, as follows:

> If the Court, upon hearing, is satisfied that less than a majority of the resident voters of the territory sought to be annexed or stricken off have remonstrated against the proposed extension or reduction, and that the proposed extension or reduction of the limits of the city will be for the interest of the city and will cause no material injury to the owners of real estate in the limits of the proposed extension or reduction, the proposed extension or reduction shall be decreed. If the court finds that a majority of the resident voters in the territory to be affected, or the owners of the property if there are no resident voters, have

> remonstrated against the change, and that the change will cause material injury to the owners of real estate in the limits of the proposed extension or reduction, the extension or reduction shall be denied.

The foregoing statute, on its face, seems to indicate that where less than a majority oppose annexation, the city has the burden of proving benefit to itself and a lack of any material injury, caused by the change, to the owners of real estate in the area proposed for annexation. Whereas, if *more* than one-half of the resident voters of the area sought to be annexed remonstrate, the city no longer has to prove benefit to itself and the burden of proof as to material injury is shifted away from the city to the remonstrants. So interpreted, the statute would make it advisable for a city to agitate the resident voters to remonstrate in order to reduce its burden of proof.

The courts have refused to attribute such an intention to the legislature. In *City of Hickman, Inc.* v. *Choate,* Ky., 379 S. W. 2d 238 (1964), the court stated, at page 241:

> . . . To clarify this apparent absurdity, we are of the opinion that this cannot have been the intention of the legislature. The result is that the issues are the same regardless of the percentage of remonstrants. The only distinction is that if the remonstrants exceed 50% the burden is on the city to show a prima facie case of benefit to itself and to the property proposed to be annexed. When it has done this, the burden shifts to the property owners to prove material injury. . . .

Yet, even this conclusion that "the issues are the same regardless of the percentage of remonstrants" does not quite dispel the obvious conviction that the legislature intended the percentage of remonstrants to make some difference in the issues.

It is submitted that an interpretation more consistent with the wording of the statute and the obvious legislative intent is that whether annexation is in the best interest of the city or not ceases to be considered where a majority oppose annexation and "the change will cause material injury to the owners of real estate in . . ." the area to be annexed. If such is the case, then annexation will be denied. The exception to this rule, as established in *Gilley* v. *City of Russell,* 212 Ky. 798, 280 S. W. 101 (1926), is that the courts will not deny annexation, even where the statutory requisites for denial exist, if such annexation is "vitally essential" to the welfare of the city. But unless the "vitally essential" test is met, it is an abuse of discretion, said that court, to adjudge annexation.

In *Adkins* v. *City of Pineville,* Ky., 271 S. W. 2d 625, 626 (1954), the court states rather succinctly that in case of remonstrance by a majority of the voters, ". . . the *single* question presented for determination is whether *the change* will cause material injury to the owners of real estate in the territory sought to be annexed or stricken." [Emphasis added.] See also *City of Ludlow* v. *Ludlow,* 186 Ky. 246, 216 S. W. 596 (1919); *Mitchell* v. *Central City,* Ky., 354 S. W. 2d 281 (1962).

Unfortunately, not many of the cases notice that it is material injury caused by "the change", not material injury caused by "the annexation", to which the statute makes reference. Thus in *City of Ludlow* v. *Ludlow, supra,* and *Mitchell* v. *Central City, supra,* the court talks about the burdens of "annexation". The statement of the court in the *Ludlow* case, *supra,* at page 597, that "after all there can be and is but one objection to the annexation, *viz.,* the payment of municipal taxes" illustrates the manner in which this seemingly slight distinction can affect what evidence the court considers relevant.

When looking at the material injury caused by "the change" as that word is used in the statute, consideration must be given to the total effect upon the resident voters in being shifted from the primary jurisdiction of one political subdivision or political subdivisions to another or others, as well as the burdens of an additional tier of government.

The court found that a majority of the resident voters had remonstrated (Record, p. 172), it having been stipulated (Record, p. 39) that at least 80% of the resident voters signed affidavits opposing annexation. (Not one appeared in support of annexation.)

Under these circumstances, the sole issue, according to the clear wording of the statute, is whether the *change* will cause material injury to the owners of real estate in the limits of the proposed extension. If the change causes such material injury, the statute is very specific that the extension shall be denied, without regard to any interest of the city.

II

Did the Court Consider Matters Not Properly in Evidence in Determining the Issue of Material Injury?

A reading of the transcript and record leaves little doubt that the principal benefit held out as justifying the change and additional taxes for the residents of the area sought to be annexed is the extension of water and sewer services, principally the latter. The court, as one of its Findings of Fact (No. 15a, p. 175 of the record), lists this as something that "will be".

This finding must necessarily be based upon a letter from Charles T. Long, Chairman of the Shelbyville Municipal Water and Sewer Commission, which was filed *ex parte* by the city attorney 36 days after the trial as an attachment to his post-trial memorandum (p. 171 of the Record). In typical Water Commission fashion, it appears to be a committment to extend sewer services to the annexed area while actually committing nothing. The Commission agrees to "assume responsibility" for sewering the area (which was its responsibility for 20 years prior to formation of the Sanitation District). It excepts from its committment every meaningful consideration, namely, how soon, who pays and how much.

At the close of the trial, there was no evidence before the court indicating that the area in question could be or would be sewered. The same Charles T. Long, who signed the letter, had finally testified, after belaboured efforts to evade the question, that there had been no official consideration, much less action taken,

on the question of sewers for the annexed area (Tr., p. 116, Q. & A. 207; pp. 138-142). The letter was obviously contrived, in light of this deficiency in the evidence, to give the impression that the Commission was agreeing to furnish sewers, without actually committing itself. Apparently, it succeeded in giving the appearance of a committment, for it is the only basis for such Finding of Fact.

But what about the city itself? It is the annexing authority which must provide benefits to offset the material injury to the owners of real estate caused by the change. Its Mayor, Marshall Long, who is also a member of the Sewer and Water Commission (but *ex officio)* acknowledged that neither he, nor the city council, nor both together, could cause any sewer extensions to be undertaken nor otherwise control extensions of service (Tr., p. 52, Q. & A. 219; p. 55, Q. & A. 229).

The only evidence tending to support the very crucial finding that one of the benefits to be weighed against the injuries resulting from the change will be extensions of sewer and water service, must be the letter which was not properly before the court.

[The power to extend sewers into the area will be discussed below.]

III

Did the Court Consider All the Relevant Evidence On the Question Whether the Change Would Cause Material Injury to the Owners of Real Estate in the Limits of the Proposed Extension?

(a) THE COURT DID NOT CONSIDER EVIDENCE THAT THE CITY HAS NO POWER TO CAUSE OR COMPEL EXTENSIONS OF WATER OR SEWER SERVICES TO THE AREA ANNEXED.

The Municipal Sewer and Water Commission was established by a 1955 Ordinance (Record, pp. 56-59) as "an independent commission to supervise, manage and control the business and affairs of the said water system and the said sewer system." The water system referred to was the privately owned Kentucky Water Service Company "now serving said city [Shelbyville] and its environs" which, under the ordinance was to be acquired with funds raised through the issuance of bonds. No geographical limits were established for its operations other than what might be implied by use of the word "environs".

A reading of that Ordinance and the Ordinance providing for the issuance of the bonds (Record, pp. 60-72) demonstrates clearly that the purpose was to put sewer and water operations beyond the reach of any city officials who might desire to use them for political or other purposes not consistent with the primary objective of producing revenue to be used for maintaining the properties, improving and expanding them and retiring the bonds.

Section 2 of that Ordinance provides that the business and affairs of the water and sewer system:

". . . shall be exclusively supervised, managed, and controlled on behalf of the City of Shelbyville, Kentucky by a Municiple Water and Sewer Commission of four members, of whom the Mayor of the City of Shelbyville, Kentucky shall constitute an ex-officio member, *but without any right to vote,* and three other members, who shall be appointed and shall qualify as follows:" [Emphasis added.]

Section 2(a) then provides for appointment of the initial members by the Mayor, with approval of the city council. The qualifications of members are carefully designated to insure independence, including an exclusion from eligibility of a person who has held an elective office of the city within the past 12 months prior to nomination. (They are not required to be city residents.)

Section 2(b) provides, in part:

"Upon the occurance of a vacancy upon said commission by expiration or his term otherwise, the remaining members of the commission, excluding the Mayor, shall submit to the Mayor in writing the names of three eligible nominees for appointment to fill each vacancy. One of such three nominees shall be appointed to fill each vacancy by the Mayor, with the approval of the Board of Council, duly recorded in the minutes, within thirty days after receipt of such nominations, which appointment shall be for a term of three years, unless the vacancy is created before the expiration of the term of the incumbent, in which event the appointment shall be for the unexpired portion of the term. Should the Mayor fail or refuse to make such appointment within the time

specified, a quorum of the commission shall elect a commissioner to fill such vacancy by duly recorded resolution."

Section 4 re-emphasizes the commission's independence by providing:

> "*Section 4* The commission shall have the direct supervision management, and control of the entire municipal water and sewer system in the maintenance, operation, improvements, and extensions thereof, as fully and completely as if said commission represented private owners, and to hire and discharge employees and to fix their compensation, provided however, the commission shall have no power to borrow money nor to enter into contracts involving the expenditure of funds derived from any source other than the operations of said water and sewer system unless first approved by the Board of Council."

(Note that the limitations upon spending do not pertain to funds derived from the operation of the system over which funds the commission has full power.)

Section 12 makes this ordinance a contract between the City of Shelbyville, Kentucky and the bond holders and prohibits any change therein until the bonds are fully paid.

As testified by Mr. Long (Tr., pp. 86-87), subsequent bond issues, one as recently as 1974, have been made under this Ordinance and it continues, therefore, to be a contract with bondholders and, as such, not alterable.

Reading the express provisions of this Ordinance and giving them their plain legal significance illustrates that the City of Shelbyville could annex the whole county and still not have the power to force construction of one foot of water or sewer line. It cannot even compel the extension of lines to areas that have been in the city for decades. The first sewer lines in Shelbyville were laid in 1909 (Tr., p. 100, Q. & A. 138), the water and sewer commission was established in 1955 (Tr., p. 100, Q. & A. 137; and see Ordinance at p. 60 of the Record), but not until 1974 (Tr. p. 87) did the commission extend sewers to a substantial un-sewered area inside the city.

The extension of sewer and water services is not now, and has never been, a benefit automatically or customarily flowing from being inside the city limits and is not a benefit that the city has the power to offer areas it seeks to annex.

And, just as important, it was never contemplated that operations of the commission could be confined by the city if the commission determined that economic considerations dictated extensions to other areas. The commission was to operate as if it represented private owners.

Mr. Charles T. Long testified that ". . . we [the commission] are prohibited from extending sewer services outside the City of Shelbyville by Ordinance." (Tr., p. 118, Q. & A. 217). That Ordinance (Record, pp. 44-55) to the extent it purports to place limitations upon the commission, is void under Kentucky Constitution, § 19, because it impairs the obligations of the

city's contract with the bondholders. The ordinance is a blatant attempt to make the services of a public utility, whose jurisdiction is not limited to the city, a political tool to force annexation. This the city contracted not to do.

(b) DID THE COURT CONSIDER THE LEGAL LIMITATIONS IMPOSED UPON THE WATER AND SEWER COMMISSION BY VIRTUE OF THE FORMATION OF THE SHELBY SANITATION DISTRICT?

The court found (Record, p. 174) that Grandview Subdivision is included in a recently formed sanitation district. Throughout this case, all parties on the side of the city have proceeded on the assumption that the Water and Sewer Commission could extend its lines into the District if it chose. Thus, Charles Long stated (Tr., p. 97, Q. & A. 125) on direct examination:

> "Well, if Grandview is annexed into the City of Shelbyville, we would take over the responsibility of seeing that Grandview was sewered . . ."

Under KRS 220.110, a Sanitation District is a political subdivision and shall have perpetual existence. Research discloses that there are no provisions for reducing the geographical boundaries of such a District or ousting it from jurisdiction, either by agreement or otherwise, except as provided in KRS 220.530.

This last cited statute applies only where a sanitation district or portion thereof is annexed by a city ". . . having existing sewers constructed and maintained by general tax funds of the city . . .".

Both Mayor Marshall Long (Tr., pp. 64-65, Q. & A. 273, *et seq.*) and Commissioner Charles Long acknowledge that none of the construction, maintenance or operation of the Shelbyville system was paid for out of general tax funds. The testimony and the Ordinance themselves show that the system was constructed and is maintained without any funds derived from general taxes.

KRS 220.260 prohibits any person or public corporation from installing any sewers, etc., within the District without approval of the District and the Department of Environmental Protection.

The court's finding that the sewers will be extended into the annexed area lying within the Sanitation District, upon annexation, ignores the legal prohibitions, set out above, imposed upon both the City of Shelbyville and the Municipal Sewer and Water Commission.

(c) DID THE TRIAL COURT GIVE PROPER WEIGHT, OR ANY WEIGHT, TO THE SIZE OF THE MAJORITY REMONSTRATING AGAINST ANNEXATION AND THE ABSENCE OF ANY SUPPORT FOR THE PROPOSED ANNEXATION?

As its third Finding of Fact (Record, p. 172), the Trial Court found that a majority of the resident voters in the area sought to be annexed had remonstrated, in writing, against annexation and filed their defense.

It did not mention that the majority was over 80%, apparently considering that fact to have no significance. Neither did the court find, as a fact, that not a single resident voter of the area appeared, as a witness or otherwise, in support of the proposed annexation.

If the sole purpose of securing a majority is to shift the burden of proof from the remonstrants to the city, then it is much ado about nothing. One remonstrating resident voter is enough to file an answer and force a trial of the issues. Realistically, little, if any, disadvantage flows from having the burden of proof in a case such as this. It is hard to imagine a case in which the city could not create an issue of fact by showing some benefits from annexation alleged to offset the burdens caused by the change.

The legislature must have anticipated that the extent of support for, or opposition to, annexation would be persuasive upon the courts, and apparently it has been.

In *City of Hickman, Inc.* v. *Choate,* Ky., 379 S. W. 2d 238, 240, the Court commented upon the back and forth recruitment and proselyting of remonstrants against and supporters for the proposed annexation which resulted in a net majority of only 12 for the remonstrants. In *City of Prestonsburg* v. *Conn,* 317 S. W. 2d 484, 485, the court took note that there were 70 in favor and only 44 against the proposal. In *City of Lexington* v. *Rankin,* 278 Ky. 388, 128 S. W. 2d 710, the court took special note of the fact that 554 out of 635 resident freeholders, or more than 87% filed a petition opposing annexation, which was denied. It went on to call attention to the fact that it was alleged in the pleadings and shown by the proof that far more than 90% had remonstrated. Such attention to the size of the majority would not have been given were it not deemed to have significant evidentiary value. That

the extent of the protest in and of itself, has probative, evidentiary value is the true significance of the statement in *Gilley* v. *City of Russell,* 212 Ky. 798, 280 S. W. 101 (1926) at 102 of the S. W. Report:

> "[1] Obviously the language of the statute grants a broad discretion to the courts in determining whether under all the facts a proposed annexation should be made. It is in evidence that at least 90 per cent of the resident voters of the territory proposed to be annexed are opposed to it, and have in one way or another entered their protest against it. Under these conditions, in the absence of some controlling reason why the annexation as proposed is vitally essential to the welfare of the city, it would be an abuse of discretion to adjudge it."

It was at the very outset of the courts reasoning that the above quotation appears. When the court said "under these conditions" it had reference to the great plurality, not (as some have implied) to the amount of territory annexed which was not noted until later in the opinion.

Under our system, the expressions of the majority through legal channels has not yet lost all its influence. It is natural that where few remonstrate, this will be viewed as evidence that the change is good, since the majority have acquiesced. Where those for and against are nearly equal, a bare majority one way or the other, this is evidence that the merits are about equal from the individuals' points of view. As the cases indicate, the courts, under these circumstances, will generally support the decision of the city if demonstrable facts make that course reasonable.

It is just as logical to view an overwhelming opposition by the resident voters as evidence that the change will cause material injury to them and the owners of real estate in the area proposed to be annexed, far exceeding any pretended benefits from annexation. It is not logical, nor compatible with our form of government, to assume that they are all motivated by illogical, self-interested obstructionism. Just as we as individuals sometimes disassociate ourselves from others because of facts known but not subject to proof, the remonstrants' objections should be viewed as a determination made in light of facts which they have experienced but which do not lend themselves to proof.

In the instant case, it was stipulated (Record, p. 40) that 75 resident voters of the area sought to be annexed signed *affidavits* protesting annexation while 17, for various reasons, did not. This represents 81.5% of the registered voters. They were joined by 47 unregistered residents. Of the 75 owner-occupied residences, there were only 12 in which neither the owner nor any adult member of the household signed an affidavit.

Not one resident voter appeared in the action, testified at the trial or otherwise supported the proposed annexation.

The reason these resident voters overwhelmingly opposed annexation might well include a justifiable belief that the audit reports (Respondents' Exhibit B) disclosing a deficit of $265.00 for 1972 and a deficit of $10,373.00 for 1973 are more indicative of the city's true financial condition during normal years than the isolated audit report for 1974 showing a $17,000.00

surplus which was the primary, if not sole, basis for the court's Finding of Fact No. 6 (Record, p. 173) that the financial condition of the city is good. That such a belief might be justified is further borne out by the Mayor's admission that the city had to postpone needed street maintenance due to lack of funds (Tr., p. 49, Qs. & As. 203-205).

These remonstrants undoubtedly have had an opportunity over the years to compare the city's street maintenance program and its snow and ice removal programs with that of the county, yet may not be able to recite a long list of specific dates and places where one proved inferior to the other. Coupled with the awareness that the county has a large amount of equipment which includes, according to Mr. Jim Rogers, County Road Engineer (Tr. Vol. II, p. 101, Q. & A. 8), four big motor graders, 15 dump trucks, 2 pick-up trucks, 2 bulldozers, a scraper, 2 rubber-tired loaders, 2 belt loaders, 5 snow plows and six truck-mounted, hydraulic salt spreaders, the experience of the remonstrants may well justify their conviction that they are better off now than they would be in a city that has two straight trucks, a pick-up truck, a street-sweeper, an auxiliary street sweeper and a roller (Tr., p. 47, Q. & A. 195; p. 48, Q. & A. 198). They might have cause to question the soundness of a department that would have two street-sweepers and no dump truck or salt spreader. The Trial Court's Finding of Fact No. 5, that, inter alia, the city has an "adequately equipped street maintenance department with three full time employees" (as compared with 22 in the county; Tr.

Vol. II, p. 104) may not be without any evidentiary support and clearly erroneous. But the comparison well illustrates why the plurality of the remonstrants should be accorded the presumption that their protest are based on material injuries which they envision will flow from the change.

That the court in *City of Ludlow* v. *Ludlow, supra,* was vastly oversimplifying the issues when it said that the sole objection to annexation can only be the payment of municipal taxes is shown by such testimony as that of Mrs. Simpson (Tr. Vol. II, pp. 20, *et seq.*) to the effect that there was a good rapport between the magistrate presently serving their district which they would naturally be reluctant to lose.

At present, neither the city nor the county provides garbage pick-up, sidewalks nor any of the utilities once associated with municipal government.

Water is available through various Water Districts, throughout all the county lying North of I-64 without regard to proximity to the city (Mayor Long, Tr. Vol. I, pp. 61-62, Qs. & As. 258-261).

Such benefits as parks, libraries, land fill, land planning and zoning are carried out under joint city-county boards and commissions.

A mutual aid pact between the city and the Shelby County Volunteer Fire Department results in identical fire protection (as opposed to rates) for residents inside and outside the city.

The services of the County Road Department, with its 22 employees and substantial equipment, will be dis-

placed in the annexed area by a city road department described above.

The City has a separate police department and there was no substantial evidence that its services would be significantly better than that now received through the Sheriff's Department and Kentucky State Police.

It should not be presumed that the remonstrants are totally ignorant of the questions existing as to the authority of the city over the commission or the questions as to the commission's right or power to extend service into the Sanitation District.

The fire insurance rates will be reduced in a portion of the annexed area only upon enlargement of the water line and installation of the fire hydrants. Since the commission, over which the city has no control, has had the jurisdiction over this area and the responsibility for it for over 20 years without installing the larger line and hydrants, it is not surprising that the remonstrants are not counting upon annexation's changing that situation.

A part-time Mayor, City Judge and City Attorney will be substituted for a full time County Judge and County Attorney who, although allowed to practice law out of their county offices, are none-the-less available there (Tr. Vol. I, pp. 49-50, Q. & A. 206-211). The remonstrants will lose the direct services of county officials with whom they have such good support (Tr. Vol. II, pp. 20, *et seq.*) and have to depend upon a whole new set of public officials and bureaucrats.

The street lights and lower insurance rates are the only new benefits they can count on. Any improvement in police protection is purely speculative and fire protection is not "free" when you have to pay more taxes to get it.

The effects of these changes simply are not susceptible of categorical proof. The best evidence as to the effect of these changes is the attitude of 100% of the people who expressed themselves at all on the subject, namely the remonstrants.

CONCLUSION

Where a majority of the resident voters of the territory sought to be annexed remonstrate against annexation by a fourth class city, the benefits to the city are not balanced against the material injury to the remonstrants. Rather, without regard to how greatly the city might benefit, the court should consider only whether there will be any material injury to [caused by the change] the owners of real estate in the area to be annexed.

The court should not merely balance the new benefits foreseeable from annexation against the burdens, usually taxes, directly added by annexation to determine if there is material injury. It should follow the statutory language and consider the direct and the resultant burdens caused by "the change," i.e. being shifted from one governmental unit to another and adding levels of government.

In finding that one of the benefits certain to flow from annexation would be the extension of sewers and

water, the court necessarily had to rely upon a letter filed *ex parte* by the city 36 days after the trial and in which the trial court was advised of a resolution passed by the Sewer and Water Commission two weeks after the trial. This resolution related to the commission's willingness to sewer the area as to which there was no evidence at the trial. The evidence at the trial was that the commission had made no affirmative plans.

On this same issue, the court ignored substantial documentary evidence, in the form of ordinances, establishing that the city had contracted away all vestiges of control over the extension of lines and over the commission created to supervise, manage and control the business and affairs of the water and sewer system. This contract is embodied in the ordinance of acquisition, the bonding ordinance and the bonds themselves (which also provide that the bonds are not a debt of the city). The negative controls attempted by the city through an ordinance generally prohibiting the extension of lines beyond the city limits without the users' agreement to annexation would likewise impair the obligations of contracts in violation of Kentucky Constitution § 19. As such, it does not limit the commission's prerogative to extend lines where it chooses, unless some other provision of state law prohibits such extension.

Such a state law, limiting extensions of sewers, is found in KRS 220.260 which prohibits any person or public corporation from constructing sewer lines in a Sanitation District without the approval of the District's Board and the Department of Environmental Protection. Since the court found the area in question

to be in the Sanitation District, the commission is prohibited from building sewers there solely on its own initiative.

Annexation would alter this situation, under KRS 220.530, only if the system had been constructed and maintained out of general tax funds, which it was not.

According to evidence properly before the court, the Municipal Sewer and Water Commission has never expressed an intent to sewer the area in question, the city can neither compel nor prevent its doing so, but the existence of the Sanitation District prevents such extension by operation of law.

The extension of water and sewer services is not a benefit that will come with annexation.

A most important fact which the court failed to consider, or, if it considered it, failed to give proper weight to it, is the fact that over 80% of the resident voters remonstrated against the annexation. Actually, since no resident of the area appeared in the action, testified, or otherwise expressed himself on behalf of annexation, the remonstrants might be deemed to be 100% of those interested enough to make their feeling known.

The cases, indeed the very basis of our form of government seem to dictate that the extent of objection (or lack thereof) should be afforded great weight in determining matters so dependent upon the exercise of discretion, by the court or otherwise, as is annexation. If the trial Court noticed the great plurality, it did not note it in its Findings.

The Court's deciding two such cases, in which the majority was so overwhelming, both upheld orders

denying annexation, stating it would be an abuse of discretion to do otherwise.

The kind of discretion allowed courts in cases of this type is based upon the reality that so many of the issues are not susceptible of definitive proof. By the same token, the remonstrants, as witnesses, can't produce dates, times, places and circumstances where county services excelled city services or vice versa.

But in living, working and moving about in the city and county, attending public meetings and forums, if they do, participating in politics, reading newspapers (which are reliable enough to carry legal notices, such as annexation) and similar activities, they have an opportunity to experience and observe facts, major or minute, which, though not susceptible of categorical proof, justify their expressed objection.

The Court should not assume, as did one Court, that the remonstrants can object only because of the municipal taxes. Their overwhelming objection should be credited to knowledge of facts indicating they will be materially injured by the change. This should be especially true where, as here, such evidence as is available is susceptible of a view tending to support their conclusion.

The judgment should be reversed and the annexation denied.

Respectfully submitted,

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